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No. 93-871

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

SHAROLYN WOOD,

Cross-Petitioner,

v.

ATTORNEY GENERAL OF TEXAS, *et al.*,

Cross-Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO WOOD'S CROSS-PETITION FOR WRIT OF CERTIORARI

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December 21, 1993

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QUESTION PRESENTED

Whether the Fifth Circuit appropriately recognized the elected Attorney General of Texas as the attorney for the state and its officials who were sued only in their official capacities in a voting rights challenge to the state's system for electing trial judges?

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The cross-petition opposed in this brief ("Wood's cross-petition") is the third of three filings seeking review of a judgment and opinion of the Fifth Circuit in a voting rights challenge to the state of Texas's system for electing its trial judges. The first filing, raising both substantive voting rights and settlement issues, was through a petition for writ of certiorari in *League of United Latin American Citizens Council No. 4434 v. Attorney General of Texas*, No. 93-630 ("*LULAC*"). The second filing, raising only settlement issues, was through a cross-petition for writ of certiorari in *Attorney General of Texas v. Entz*, No. 93-813.

Wood's cross-petition offers no clearer description of the designated respondents than that they are the

Attorney General of Texas and unspecified others. As expressed in each of his earlier filings in Nos. 93-630 and 93-813, the state's Attorney General represents fifteen official-capacity parties, including himself.[1] Wood's position in this case is such that the Attorney General himself both as an official-capacity party and as attorney for all the official-capacity state parties is targeted by Wood. Therefore, this brief in opposition is filed on behalf of the state and the Attorney General as cross-respondents.

OPINIONS BELOW

The opinions below are reproduced in the appendices to the *LULAC* petition and the state's Memorandum Response in No. 93-630.

STATEMENT OF THE CASE

The Statement of the Case at pages 2-6 of the state's Memorandum Response in No. 93-630 canvasses the case and will not be replicated here. No further development of the case really is required for the Court to dispose of the question presented by Wood's cross-petition; yet, mindful of the Court's Rule 15.1 admonition that any perceived misstatements of law or fact potentially bearing on the issues be addressed in briefs such as this one, the Attorney General and the state elaborate as follows.

Both Judge Wood of Harris County and Judge Entz, her

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[1] The representation of one official-capacity state respondent -- the Chief Justice sitting as chair of the state Judicial Districts Board -- is in dispute, with a private attorney purporting to represent him. Inasmuch as the Attorney General represents the state and the state is the real party in interest, *see Kentucky v. Graham*, 473 U.S. 159 (1985), the Attorney General asserts that he is the Chief Justice's proper attorney here. *See Attorney General of Texas v. Entz*, Cross-Petition, No. 93-813, at 9-10.

Dallas County counterpart, intervened in their personal capacities. The Fifth Circuit did not grant their efforts to extend their interventions to encompass counties other than the ones where they reside or to transform their interventions into official-capacity ones. Neither of them has asked this Court to review the Fifth Circuit's intervention decisions as to them. Therefore, they are before this Court only in their personal capacities and (at most) only as to their two counties of residence. *See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 114 S.Ct. 425 (1993) (holding that circuit court intervention denial as to which review is not sought in this Court limits putative intervenors' standing to that which it had in lower appellate court).

The main thrust of Wood's statement of the case in her cross-petition is to deride the state's attorney who argued the state's case when it first came before this Court in *Houston Lawyers' Association v. Attorney General of Texas*, 111 S.Ct. 2376 (1991), for presenting a "wholly new and incomprehensible argument." Wood Cross-Pet. at 7. The argument, premised on the plain statement rule for extension to core state functions of congressional enactments under section 5 of the Fourteenth Amendment, was not wholly new, having been fully briefed to the Fifth Circuit in the first round of appeals in this case. As to its incomprehensibility, it is clear that this Court did not find it incomprehensible inasmuch as the argument's premises were adopted by this Court in an opinion issued the same day as the *HLA* decision, *Gregory v. Ashcroft*, 111 S.Ct. 2395 (1991), in a case in which the parties' briefs did not appear to make that argument.[2]

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[2] Another example of Wood's misguided *ad hominem* attacks in support of her cross-petition is in her elided quote from the *HLA* oral argument by the state's counsel. Wood Cross-Pet. at 7. The transcript of the argument reflects that all that was being explained was that defense counsel found it difficult to place himself in plaintiff counsel's shoes in assessing a hypothetical question. Tr. 53.

Finally, given the tenor of Wood's factual recitation, it is worth reiterating that the Attorney General has never sought to arrogate to himself the authority to determine the future direction of Texas's judicial selection system. In this case, he has done nothing more than agree with the plaintiffs that the federal trial court should be permitted to conduct a hearing on a proposed settlement at which Judge Wood and whoever else so chooses may make their views known and present evidence. It is this conduct, of proposing a hearing on a settlement of a long and bitterly fought suit involving highly-charged public policy issues, that Wood argues to the Court violates six federal and seven state constitutional provisions, not to mention three state statutes. Wood Cross-Pet. at 5-6 n.1.

REASONS FOR DENYING THE WRIT

This private party, with either no justiciable interest or limited to defending at most one of ten targeted county electoral systems and lacking standing to assert any of the constitutional rights for which she provides even a modicum of argument, points to no decisional conflicts and no important federal jurisprudential rules implicated by the Fifth Circuit disposition of the motions she seeks to have this Court review.

The Fifth Circuit, which wrote an unusually long and elaborate opinion on both the voting rights merits and settlement issues, was able to dispose of Wood's motions to realign and disqualify the Attorney General in one short paragraph. LULAC App. 17a-18a. Judge Wood has failed to present the Court with a single conflicting appellate opinion on this point or a single important policy of federal jurisprudence which the Fifth Circuit's disposition of her motions calls into play.

Her blunderbuss attack on the Fifth Circuit relies on the Guarantee Clause of the Constitution, the Tenth Amendment, and the separation of powers doctrine. In the capacity in which she appears before this Court -- her personal capacity -- she cannot even raise a claim under the Guarantee Clause, because it does not provide enforceable *private* rights. *Pacific States Telegraph & Telephone Co. v. Oregon*, 223 U.S. 118 (1912).

The Tenth Amendment, to the extent it can provide an independent constitutional ground for statutory invalidation, operates as a limitation on *federal* power (which is not called into question by Judge Wood), not state power; moreover, like the Guarantee Clause, it is assertable by a state, not by a private individual. *Cf. New York v. United States*, 112 S.Ct. 2408 (1992). It is incomprehensible how the Attorney General's joint motion with the plaintiffs to remand this case to the district court implicates the Tenth Amendment in any fashion.

The final basis for Judge Wood's effort to obtain review of the Fifth Circuit's rebuff of her effort to cast aside the state's elected Attorney General as the state's attorney is listed as the separation of powers doctrine. Yet, nowhere in the text of her cross-petition is there any discussion of the doctrine, any citation to case authority explicating the doctrine, or any explanation of how a state official's handling of the defense of a challenged state electoral system implicates a federal constitutional doctrine which concerns the relations of the three *federal* branches of government.

Judge Wood's effort is a feeble one. In fact, it is so feeble, and so groundless, that it does not appear really to be a serious effort at obtaining review on the questions it purports to present to the Court. Rather, it seems to offer an excuse for the leveling of questionable

accusations against the Attorney General in order to harden the Court's attitude towards the merits of the settlement issues presented for review in Nos. 93-630 and 93-813. Those petitions, however, should be evaluated on their own merits, not by the quality of questions presented in Wood's cross-petition.

Judge Wood either has no judicially recognized standing to assert the constitutional rights forming the basis of the question she presents for review, or she offers absolutely no authority or discussion of a right which seems wholly inapplicable to the instant situation. Furthermore, she has offered no authority in conflict with the complained-of Fifth Circuit action and no coherent explanation of how that action implicates any important federal issues.

CONCLUSION

For the foregoing reasons, the Court should deny Wood's cross-petition for writ of certiorari.

Respectfully submitted,

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